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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ~~73~~ - 1084

WENDELL P. RYNERSON, - - - Petitioner

versus

THE UNITED STATES, - - - - Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WENDELL P. RYNERSON
403 E. Second Street
Madison, Indiana 47250
Petitioner and Attorney for Himself

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

INDEX

PAGE

Petition for Certiorari 1

Opinions Below .....2 and passim; App. 8–35*

Kirby v. U. S., 201 Ct. Cl. 527.....passim; App. 15–34

Dissenting opinions .....passim; App. 27–34

Judge Davis .....passim; App. 27–30

Judge Nichols .....passim; App. 30–34

Rynerson v. U. S., unreported.....passim; App. 8–15, 34, 35

Jurisdiction of Supreme Court 2

Questions Presented 3

Constitutional Provisions .....5; App. 1

Statutes .....3-5 and passim; App. 1-5

Rules of Lower Court .....5; App. 5-7

Statement of the Case 5–13

Jurisdiction of the Lower Court 7

Reasons for Granting the Writs 13–42

Nature of the Case 15–19

A. The 1973 Decision of the Lower Court Misinterprets the Statute of Limitations and Related Public Policies, Ignores Its Own Rules, and Improperly Gives Retroactive Effect to a New Rule of Law 15–38

*In copying the Appendix, the word and sign for Section were sometimes omitted and sometimes indicated by X or by a dash. The Appendix, being voluminous, is separately presented (concurently herewith) under Rule 23(1). It bears a light blue cover.

PAGE

Reasons for Granting the Writs—Continued

Statute of Limitations 20–28

Laches 28–31

Other Public Policies 31–35

Retroactive Effect of New Rule of Law Was Improper 35–38

B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action 38–42

Conclusion 43

TABLE OF AUTHORITIES CITED

Cases

PAGE

Alpert v. U. S. (1963), 161 Ct. Cl. 610 30

Appel v. U. S. (1955), 130 Ct. Cl. 688, 128 F. Supp. 153 ..... 6, 20

Belton v. Trayner (C. A. Va. 1967), 381 F. 2d 82...32, note

Cason v. U. S. (1972), 198 Ct. Cl. 650, 461 F. 2d 784.. 9, 30

Cason v. U. S. (1973), 200 Ct. Cl. 424, 471 F. 2d 1225 9, 17, 30

Cohens v. Virginia (1821), 6 Wheat. 264 at 404, 19 U. S. 82 at 100, 5 L. Ed. 257 21

Crown Coat Front Co. v. U. S. (1967), 386 U. S. 503 at 511 and 515, 87 S. ct. 1177, 18 L. Ed. 2d 256.... 24

Denby v. Berry (1923), 263 U. S. 29, 44 S. ct. 74, 68 L. Ed. 148 ..... 8, 14 41, 42

Diamond v. U. S. (1970), 192 Ct. Cl. 502, 427 F. 2d 1246, note 11 39

England v. Louisiana State Board of Medical Examiners, (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. ct. 461 ..... 21, 32 35, 38

Friedman (Betty) v. U. S. (1962), 151 Ct. Cl. 1, 310 F. 2d 381, cert. denied 373 U. S. 932 25

House v. Mayo (1945), 324 U. S. 42, 65 S. ct. 517, 89 L. Ed. 739 39

Kirby (Lindbergh) v. U. S. (1973), 201 Ct. Cl. 527 .2, 10–13 15–20, 22 25, 28, 29 31, 34, 37 38

Kortz v. Guardian Life Ins. Co. (CA 10, 1944), 144 F. 2d 676, cert. denied 323 U. S. 728 42

Lemly v. U. S. (1948), 109 Ct. Cl. 760, 75 F. Supp. 248 ..... 32, 38

Cases: (Cont'd)

PAGE

S & E Contractors, Inc. v. U. S. (1970), 433 F. 2d 1373, 193 Ct. Cl. 335, reversed in 1972, 406 U. S. 1, 92 S. ct. 741, 1411, 31 L. Ed. 2d 658.....24, 33

Seltzer v. U. S. (1943), 98 Ct. Cl. 554..... 6, 41

Shaw v. U. S. (1966), 174 Ct. Cl. 899, 357 F. 2d 949.. 5

Stevanus v. U. S. (1957), 138 Ct. Cl. 149, 149 F. Supp. 655 24

Taylor's Administrator v. U. S. (1878), 14 Ct. Cl. 339 .....14, 25

U. S. v. Taylor (1881, Oct.), 104 U. S. (14 Otto), 216, 26 L. Ed. 721.....14, 25

U. S. v. Throckmorton (Oct. 1878), 98 U. S. 61, 25 L. Ed. 93 .....14, 19 32, 34

Wehrman v. Conklin (1894), 155 U. S. 314, 15 S. ct. 129, 39 L. Ed. 167.....14, 17, 28

Willcox v. Consolidated Gas Co. (1909), 312 U. S. 19, 53 L. Ed. 382, 29 S. ct. 192, 48 LRA NS 1134..... 35

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF LOWER COURT

These lengthy provisions are contained in an Appendix presented separately from but concurrently with this Petition for Certiorari. References to the pages where each of these provisions is cited or mentioned in the Petition, and to the pages of the Appendix where each of such provisions begins, follow:

United States Constitution

	Pet., page	App.
Art. I, ¶8	5, 26	1
Art. III, Sections 1 (1) and 2 (2)	5, 26	1
Fifth Amendment	5, 15, 27 38, 40	1

United States Statutes

U. S. Code:	Pet., page	App.
10 USC 867 (b-d)	18, note	
10 USC 1331	3, 22, 23, 25	1, 2
10 USC 1331 (b)	16	1
10 USC 1331, 1332	6, 15, 16, 36	1, 2
10 USC 1332	4	2
10 USC 1551	34	
10 USC 1552	4, 6, 34	2
10 USC 8914	10, 15	
28 USC 1346 (a)	5, 18, 21	3
28 USC 1491	5, 7, 21	3
28 USC 1506	21	
28 USC 2411 (b)	5, 34	4
28 USC 2501	5, 7, 10 11, 17, 22	4
28 USC 2516	5, 34	4
38 USC 210	18, note	
50 App. USC 731, 732	5, 42	4, 5

U. S. Statutes at large:

		Pet., page	App.
1916	National Defense Act, 42 Stat. 1033	5	
1941 Dec. 13 (see 50 App. USC 731 732)	55 Stat. 799, 800	5, 42	
1948 June 29 (see 10 USC 1331, 1332)		39	
1952 July 3	66 Stat. 330	5	5
1972 August 29 (see 28 USCA 1491 pock. pt.)	86 Stat. 652	19, 28	

United States Court of Claims

	Pet., page	App.
Rule 37	5	5
Rule 37 (b)	26	5
Rule 38	5	5–7
Rule 38 (b)	26	
Rule 38 (c)	8, 39	
Rule 38 (h)	26	

Text Books

34 Am. Jur. 927, "Mandamus", §150 31

15A CJS 71, "Common Law", §14, t.n. 60 32

81 CJS 591, "Specific Performance", §82 31

Charles Alan Wright, Handbook of the Law of Federal Courts, §16 (1970, 2d ed.) 27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ———

WENDELL P. RYNERSON, - - - *Petitioner*

v.

THE UNITED STATES, - - - *Respondent*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Wendell P. Rynerson, plaintiff in case number 57-71 in the United States Court of Claims prays that the United States Supreme Court issue to said lower court writs of certiorari to review each of the judgment-orders of the United States Court of Claims as follows:

A. the one dated 22 June 1973, dismissing his petition to said court, as to which judgment-order said court on 17 October 1973 denied his motion for a rehearing; and

B. the one dated 11 November 1971, insofar as it rejected his contention that he was not discharged from his reserve commission, as to which judgment-order said court also on 17 October 1973 denied his motion for a trial and/or reconsideration.

OPINIONS BELOW

The lower court has not rendered a reported opinion in *Rynerson* v. *U. S.* However, on 11 May 1973, the lower court rendered an opinion in *Lindbergh Kirby* v. *U. S.*, number 760-71. That opinion, with two dissenting opinions is at pages 15-34 of the Appendix and will be officially reported in 201 Ct. Cl. 527. Unofficially, it may or may not in the future be reported. That opinion is needed, according to page 34 of the Appendix, to ascertain the grounds of the lower court's later dismissing *Rynerson* v. *U. S.*

Unreported administrative action and judicial actions and opinions in or preliminary to *Rynerson* v. *U. S.* are also at pages 7-15 and 34 and 35 of the Appendix.

This material is voluminous consisting of 37 pages, and is separately presented, i.e., is not actually fastened to the Petition for Certiorari (Rule 23(i)). The cover of the Appendix is light blue.

JURISDICTION

The judgment-orders of the United States Court of Claims sought to be reviewed were dated and entered 11 November 1971 and 22 June 1973. An order dated and entered 17 October 1973 denied petitioner Rynerson's timely motions for rehearing and for a trial and/or reconsideration.

Jurisdiction of the Supreme Court is invoked under 28 USC 1255.

QUESTIONS PRESENTED

A. Can the United States Court of Claims dismiss a petition for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

B. Can the Court of Claims refrain from hearing evidence on an issue presented by a petition for money due from the United States under statute, which issue the government never attacked by motion or demurrer, and the facts as to which issue the government did not deny until after the court had decided the issue?

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF THE LOWER COURT

The statutory basis of petitioner's claim below for reserve retirement pay due from the Army was Title 10, U. S. Code. The following sections of it are pertinent:

§ 1331. *Age and service requirements.*

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(3) he performed the last eight years of qualifying service while a member of any category named in section 1332 (a) (1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and

(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

(b) Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of the Treasury, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

(c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

§ 1332. *Computation of years of service in determining entitlement to retired pay.*

(a) Except as provided in subsection (b), for the purpose of determining whether a person is entitled to retired pay under section 1331 of this title, his years of service are computed by adding—

(1) his years of service, before July 1, 1949, in—

(A) the armed forces;

The case also involves inter alia other parts of the United States Code (of Statutes): Title 10, §1552;

Title 28, §§1346 (a), 1491 ¶ 1, 2411 (b), 2501 and 2516; Title 50 App. §§731, 732; United States Statutes at Large, Volume 66, page 330, the United States Court of Claims' Rules 37 and 38, and the United States Constitution, Article 1 §8, Article III §§1 (1) and 2 (2) and the Fifth amendment thereto.

Such provisions are in the aggregate lengthy. Their pertinent texts are in the Appendix, pages 1 through 7.

STATEMENT OF THE CASE

1. *Birth date.* Petitioner was born 28 April, 1905.

2. *Enlistment.* He enlisted in the United States Army Reserve on 22 November 1927.

3. *Continued Reserve Service.* He continued as a member of such reserve in enlisted or commissioned capacities and was last commissioned therein during January 1940 under the National Defense Act of 1916. Such commission was extended to 1952 by an Act of 13 December, 1941 (55 Stat. 799, 800) and by an Act of 3 July, 1952 (66 Stat. 330), unless sooner terminated by the President.

4. *Discharge from Wartime active service.* On 14 October 1945, the Army honorably discharged and released petitioner from continuous active wartime service and duty which had lasted over four years. The armed services could do this either in time of war or peace, for any reason or no reason. *Shaw* v. *U. S.*, (1966), 174 Ct. Cl. 899, 920, 357 F. 2d 949, 963. The Army had paid petitioner to the time of his discharge,

so he had no claim for further active duty or service pay, either rendered or which he might have rendered. *Appel* v. *U. S.*, (1955), 130 Ct. Cl. 688, 128 F. Supp. 153.

5. *Ending of commission not indicated by discharge certificate.* The said discharge was evidenced by a certificate dated 14 October 1945. It did not indicate that petitioner was discharged from his reserve commission.

6. *Discharge in another case specified discharge from commission.* The Army had expressly stated that reserve officer Seltzer was discharged from his commission, according to his case decided in 1943, *Seltzer* v. *U. S.*, 98 Ct. Cl. 554.

7. *Petitioner timely exhausted an administrative remedy permitted by Congress.* Within due time, petitioner applied to the Army Board for Correction of Military Records as permitted in 10 USC 1552, which board without any hearing denied him any relief.

8. *Claim for Retired Reserve Pay.* In 1965, petitioner claimed under 10 USC 1331, 1332, retirement pay from the Department of the Army, effective 1 May 1965.

9. *Army's Denial of Retired pay.* After petitioner had reached age 60, the Department of the Army on 20 May 1965 denied his claim for retired military reserve pay (App. 7, 8) and he has not received any such pay.

10. *When petitioner claimed in Court of Claims, and basis for its federal jurisdiction.* On 25 February 1971, within six years after petitioner reached the re-

quired age of 60, and within six years after he applied for and was denied such retired pay, he filed against the United States, a claim or petition number 57-71 in the United States Court of Claims for such pay. That was the case as to which he now seeks certiorari. The basis for federal jurisdiction in that court was 28 USC 1491 as it stood before 1972, and 10 USC 1331.

11. *What petitioner claimed and did not claim in court.* His petition below asserted two grounds of claim: 1, that his 1945 discharge did not end his reserve commission or service, but 2, that if it did, it was wrongful. He claimed that about $7,000 was due from the government from 1965 to 25 February 1971, but did not request any equitable relief.

12. *First (1971) opinion below on statute of limitations.* In 1971, by motion to dismiss, defendant raised the question of time of accrual of the claim, because of the six year statute of limitations. Defendant had not up to then raised such question by affirmative defense as required by rules 37 and 38 of the Court of Claims.

After that question was briefed, orally argued, and considered by the then full court below, that court on 11 November 1971, rendered a unanimous written opinion that petitioner's claim for retired pay was *not* barred by the statute of limitations since he had filed it in that court within six years after its 1965 accrual. See App. 8-10.

Defendant after its said motion to dismiss, never raised the question of statute of limitations by affirmative defense as required by said rules.

13. *Dictum in same 1971 opinion.* Without any answer of denial by defendant, without any motion by defendant attacking, and without the presentation of any evidence contrary to,* plaintiff-petitioner's first ground of claim, that the 1945 discharge did not affect his reserve commission, for which ground he quoted *Denby* v. *Berry* (1923), 263 U. S. 29, 33, 34, 44 S. Ct. 74, 68 L. Ed. 148, the lower court in said 1971 opinion "rejected" such first ground of claim. Such opinion did not mention *Denby* v. *Berry* nor any other authority as to such ground of claim.

14. *Cause of action not denied was admitted, under Rule 37 (c).* Rule 37 (c) of the court below provided as did court precedents, that allegations in a petition, if not denied, are taken as true.

15. *Court below violated its rule 37 (c).* The court below violated its own Rule 37 (c) and precedents by not taking as true said first ground of the petition, that the discharge of 14 October 1945 did not end petitioner's reserve service or commission.

16. *Referral for trial and trial.* In the same 1971 opinion, the lower court referred ". . . the case . . ." to a ". . . trial commissioner for trial on further appropriate proceedings." Such trial was held in June 1972. The commissioner sought to limit it to the question of the wrongfulness of the discharge (sec-

*Though petitioner believes no record other than his briefs below so shows, he reports: During brief argument shortly before 11 November 1971, one of the judges related that his own discharge as an officer ended *his* commission. This unsworn and unexplained statement from the bench was not subject to cross-examination. It may not have been relevant, but its persuasive effect on the other judges may be imagined.

ond ground of claim). This was due to the court's dictum that it was rejecting the first ground that the discharge did not affect petitioner's reserve commission. The commissioner refused to permit petitioner to introduce evidence to explain his delay in filing a petition with the Court of Claims, the court below.

17. *Commissioner's opinion* (App. 10). On 14 December 1972, the commissioner opined that the petitioner had been denied administrative due process. The commisisoner did not purport to decide any question about the statute of limitations. Without finding that any delay of petitioner had injured the defendant, and though in fact indicating to the contrary (immediately before 6 numbered points), the commissioner recommended dismissal for laches, relying on the first *Cason* opinion (1972), 198 Ct. Cl. 650, 461 F. 2d 784.

18. *Basis of commissioner's opinion undermined.* Said first opinion in *Cason* v. *U. S.* was overruled on 18 January 1973 in an opinion reported in 200 Ct. Cl. 424, 471 F. 2d 1225, in the same case. That court did not thereafter give its commissioner a chance to reconsider his recommendation that Rynerson's claim be dismissed for laches.

19. *Failure to hold hearing on effect of discharge.* The petitioner again drew the lower court's attention to the failure to hold a hearing on his first cause of action, that the discharge did not end his commission. This effort was by his exception 2 to the commissioner's report. The court below has not acted on any excepton to such report, nor, after being duly advised, upon any of the merits of palintiff's petition below.

20. *Change of Judges on Court of Claims.* By January 1973, three new judges had begun to serve on the Court of Claims. They all participated in subsequent rulings on the claims of both *Kirby* and *Rynerson*.

21. *The claims of Lindbergh Kirby.* Late in 1971, Kirby filed a claim number 760-71 in the Court of Claims for both active and retirement pay because of armed force membership. He did not claim any reserve membership. The only factual ground for his claim was the allegation that he had been wrongfully discharged in 1963 from an enlistment which would have lasted to 1967. The additional credit of four years would have completed the 20 years of service required for his retirement. The statutes under which he sued did not require him to attain a certain age. The statute under which he claimed retired pay required him to apply for such pay (10 USC 8914), in order to be entitled to it. Both Kirby and the United States in that case moved for summary judgment.

22. *1973 Kirby opinion on time-bar.* 11 May 1973, one of the three new judges of the court below delivered the opinion in *Kirby* v. *U. S.*, 201 Ct. Cl. 527 (longest item of Appendix). The two other new judges of that court joined in the opinion. Depending entirely upon its view that part of Kirby's claim (the part seeking active duty pay) was time-barred, the opinion sustained defendant's motion for summary judgment and dismissed Kirby's petition.

The majority opinion denying Kirby a recovery, did not mention laches, but cited the 6 year statute of limitations and mentioned stale claims and "public

policy", because Kirby had not sued *in some other court* within six years from the date of his discharge, to establish that it was wrongful. Dissenting Judge Nichols said that the majority was announcing a new rule of law. No opinion was given as to the effect of the statutory requirement that Kirby apply to the armed service for retired pay.

23. *What the parties to Rynerson* v. *U. S. did not seek.* The petitioner Rynerson never in court nor elsewhere claimed pay for active or inactive duty or service for any period after the discharge, 14 October 1945. He has *not* asked any court for reinstatement, mandamus, declaratory judgment nor for any other equitable relief in the premises.

The United States did not move the lower court for summary judgment against Rynerson.

24. *Second opinion below in Rynerson* v. *U. S., on statute of limitations, and accrual of his claim.* Without stating that it was setting aside its decision of 11 November 1971 that petitioner Rynerson was not barred by the statute of limitations, and without stating that it was setting aside its 1971 holding that his claim had not accrued before 1965, the court below on 22 June 1973 dismissed his petition, relying entirely on *Kirby* v. *U. S.*

That case depended entirely on Kirby's failure to sue within six years of his allegedly wrongful discharge; it did not involve Kirby's attaining age 60, nor any other age; unlike Rynerson, Kirby had not questioned the effect of his discharge as ending his

connection with the armed services, since Kirby was not a reservist.

Dismissal of Rynerson's petition on 22 June 1973 and refusing any reconsideration on 17 October 1973 denied Rynerson any claims court remedy for non-payment of retirement pay, whether his discharge was wrongful or not.

Said action and opinion of 22 June 1973 clouded the distinction between *Kirby* and *Rynerson* in several ways:

It failed to cite the statute under which Rynerson claimed, which required him to be 60 years old before he was entitled to retirement pay.

It failed to mention that Rynerson had to be 60 years old before he could sue for retirement pay, and that he had no claim for any other kind of pay.

It failed to show that he was discharged in 1945.

It failed to show that he became 60 years old in 1965.

It failed to show that until 1965 and until after he applied to the army for and was denied retirement pay, he would not know whether he had qualified for retirement nor whether his cause of action had accrued.

It gave the mistaken impression that he had delayed for almost 26 years after accrual and before suing, when in fact he delayed less than 6 years after accrual of his claim. The limitation period was a full 6 years after accrual, not almost 6 years. The court had previously held that accrual was in 1965. It did not give an adequate explanation for contradicting its 1971 holding as to the statute of limitations in Ryner-

son's case, and did not specifically overrule such holdings.

25. *Failure to hold evidentiary hearing on effect of discharge.* In 1973, the petitioner Rynerson, by motion for trial and/or reconsideration, again raised in the lower court the question of the effect of the discharge upon Rynerson's commission. On 17 October 1973, that court overruled that motion without opinion, and has never held a hearing on the evidence as to the effect of Rynerson's discharge.

26. *Amount of Rynerson's claim.* If Rynerson's claim does not already exceed $10,000, it will do so by October 1974.

27. *The Court of Claims' dismissals were final.* The Court of Claims has finally dismissed the petitions there of Kirby and Rynerson; on 17 October 1973, that court denied petitioner Rynerson's motion for a rehearing and his motion for a trial and/or reconsideration (App., last item).

REASONS FOR GRANTING THE WRITS

1. The Court of Claims has decided the following important question of federal law which has not been, but should be, settled by this court:

> Can the United States Court of Claims dismiss a petition for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

2. The Court of Claims has decided federal questions in ways conflicting with the following decisions of this court:

Wehrman v. *Conklin* (1894), 155 U. S. 314, 325, 326, 15 S. Ct. 129, 39 L. Ed. 167; holding that a pure claim for money filed within the statutory period of limitation may not be dismissed on that ground or for laches.

Taylor's Administrator v. *U. S.* (1878), 14 Ct. Cl. 339, 353, affirmed in *U. S.* v. *Taylor* (Oct. 1881), 104 U. S. (14 Otto) 216, 26 L. Ed. 721, where the courts held that a claim against the government for money due under a statute which requires the claimant to file an application with the executive branch, does not accrue until the application is filed with such branch. *U. S.* v. *Throckmorton* (Oct. 1878), 98 U. S. 61, 65, 25 L. Ed. 93, holding that plaintiff may not split his causes of action.

Denby v. *Berry* (1923), 263 U. S. 29, 33, 34, 44 S. Ct. 74, 68 L. Ed. 148 holding that discharge of a reservist does not end his reserve status.

The above (except *Denby* v. *Berry*) supports point A of the petition for certiorari; the following reason, No. 3, and *Denby* v. *Berry* support point B of the petition for certiorari.

3. The Court of Claims has so far departed in *Rynerson* v. *U. S.* from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision under its rule 19-1 (b), end. This is true as to Rynerson's first ground of claim because the lower court rejected it before de-

fendant had denied such facts as required by that court's rules, and notwithstanding various requests, denied plaintiff any hearing on that ground of claim, thus denying him due process guaranteed by the federal Fifth Amendment.

A. The 1973 Decision of the Lower Court Misinterprets the Statute of Limitations and Related Public Policies, Ignores Its Own Rules, and Improperly Gives Retroactive Effect to a New Rule of Law.

NATURE OF THE CASE

Rynerson's case involves inconsistent decisions in the same case on a federal statute of limitations, the anomalous doctrine of laches in a court of law established by Congress, and a complete failure by the trial court to adjudicate another issue, thus denying Fifth Amendment due process.

The case is of large importance to many people for different reasons. It and the *Kirby* case which was the reason for the lower court's dismissing Rynerson's petition, both involve long-time veterans who alleged they were wrongfully discharged and thus denied their rights to non-disability retirement pay.*

Kirby, a regular veteran, claimed under 10 USC 8914. Rynerson, a reservist veteran, claimed under 10 USC 1331, 1332. Both filed in the lower court when it had jurisdiction only to render money judgments.

*Rynerson's other basis for alleging that the government had improperly denied him retirement pay is treated in B, post. That is the ground of claim which the trial court failed entirely to adjudicate.

In deciding against *Kirby,* the lower court cited a later statute passed after he and Rynerson had begun to litigate, and gave it retroactive effect.

In *Kirby,* the lower court laid down a rule that was new, according to dissenting Judge Nichols. As applied to Rynerson's claim, the rule would determine the time of accrual of claims for non-disability retirement without considering the differing conditions precedent prescribed by different statutes. The new rule would make the time of discharge control, regardless of subsequent events required by the entitling statutes.

The biggest difference between the cases of Kirby and Rynerson is that Kirby could properly have applied to the armed service for retirement pay within about 3 years after his honorable discharge, but Rynerson, after his honorable release from active duty, had to wait a period of almost 20 years until he reached the age of 60 before he could properly apply to the armed service for such pay. Rynerson's application, according to 10 USC 1331 (b), "must" have been made to the armed force in which he "last served."

Another important difference is that while Kirby's claim for regular Air Force retirement pay was said to depend on his entitlement to pay for regular *active duty,* Rynerson't claim which was as a reservist only, did not so depend.

The lower court in Kirby announced the new rule which it indiscriminately followed in *Rynerson,* that it would not act on cases of illegal discharge filed more than six years after such discharge, unless the plain-

tiff had first established the illegality in some other court. The lower court held that this should have been done by actions of equitable nature such as mandamus or declaratory judgment.

The majority in *Kirby* ignored the expense and inconvenience to that plaintiff and others like Rynerson who were similarly situated, which the new rule would prevent from being remedied. Yet Rynerson had been through a trial on the merits and various other steps, before and after the Kirby decision.

By denying Kirby and Rynerson a decision on the merits, the claims court discouraged veterans of the armed services, and other federal personnel having comparatively small claims, from going to that court, and discouraged them from relying on the full 6-year period of limitations. Yet that court in *Cason* v. *U. S.* (1973), 200 Ct. Cl. 424, 471 F. 2d 1225 and the Supreme Court in *Wehrman* v. *Conklin* (1894), 155 U. S. 314, 325, 326, 15 S. Ct. 129, 133, c. 2, 39 L. Ed. 167 recognized that a pure action for money can be filed in court up to the last day or month of the allowed period of limitation, and that a plaintiff who seeks only money and who so delays, is not barred by his mere delay from maintaining such a claim.

Since 1945, members of the armed forces, other federal personnel, and those employed under private pension plans have been more numerous than they were before World War II. Many of them retire after 30 years. The crop of retirees or applicants may peak about 1975. The case will be a timely precedent for those whose rights depend on reaching an age such as

60, be they veterans of the armed services, the civil service, or merely of labor.

Unless the case of Kirby or the case of Rynerson is reversed, it can harm some of the classes trained in violence and in group action. Too little regard for their rights and the process of law due them could threaten our domestic tranquility, practicularly in times of unemployment, and, eventually, our national defense.

Petitioner Rynerson's claim against the United States will soon amount to more than $10,000, if it does not already. A judgment against the United States in federal district court cannot exceed that amount (28 USC 1346 (a) (2)). Thus, the Court of Claims will be or has been his only clear judicial avenue to full justice. The decision below closes that route for his escape from injustice.*

The decision below would require petitioner to resort first to a suit for mandamus, reinstatement or declaratory judgment. It would thus require him to risk the devious and hazardous backroads of collateral litigation. Congress has not evinced an intention to so discommode him.

The lower court decision usurps Supreme Court power to supervise lower courts, mentioned in this court's rule 19-1 (b), end. It was also unseemly for the Court of Claims to pass the buck to some other trial court.

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*Neither the Court of Military Appeals nor the Veterans Administration has jurisdiction over claims for such retirement pay (10 USC 867(b-d); 38 USC 210).

The Kirby case invites all similarly situated plaintiffs in the Court of Claims and possibly in federal district courts, to split their causes of action, whether their claims amount to more or less than $10,000.

Splitting a cause of action increases litigation and a policy of the law based on two maxims therefore forbids it. *U. S.* v. *Throckmorton* (Oct. 1878 term), 98 U. S. 61, 65, 25 L. Ed. 93. Yet the lower court threatens plaintiffs that laches may bar them *if they do not* split their causes of action.

In denying Kirby relief, the lower court cited the 1972 amendment to 28 USC 1491. According to that court, Rynerson's claim is so intertwined with Kirby's issues that in Rynerson's opinion, the Supreme Court should consider such amendment in deciding whether to grant certiorari on the petition here.

There is great public interest at this time when Congress has just *enlarged* the powers of the Court of Claims, that such court *not* be permitted to *shrink* its own powers, as it did in *Kirby,* followed in *Rynerson.* Any actual or supposed adaptation to that court's new powers is currently important, and probably will be for a long period in the future.

This case also involves a number of other important and fairly included legal questions: the functioning of an unique federal court; that court's usurping Congressional power to limit its jurisdiction, and non-use of its own power.

STATUTE OF LIMITATIONS

Can the United States Court of Claims dismiss a petititon for money (filed within 6 years of accrual) because the plaintiff has failed to assert some narrower cause of action in some other court?

This question should be answered negatively.

The Court of Claims dismissed the petititons of Kirby and Rynerson who both sought retirement pay, because they had failed to assert some narrower cause of action in some other "appropriate" court. In ordering dismissal for this reason, the claims court exercised a discretion which Congress had not given.

The narrower actions which the claims court said Kirby (and indicated Rynerson) should have brought were called in part ". . . reinstatement, mandamus, (and) declaratory judgment . . .". Another action was mentioned which Kirby could have brought with some possibility of success, but Rynerson would certainly have failed in it. This was an action for "active duty back pay". Rynerson, being a reservist, had no right to be paid after he was relieved from active duty. *Appel, et al., supra.*

No statute gave the Court of Claims discretion to limit its own jurisdiction over any class of cases. No statute gave that court the power to require plaintiffs to have asserted some narrower cause of action in some other court. No statute gave that court power to dismiss cases of plaintiffs who have failed to assert some narrower cause of action in some other court.

District courts and the Court of Claims have concurrent jurisdiction over money claims against the United States which are based on statute and contract up to $10,000 (28 USC 1346 (a) (2) and 1491). Therefore, petitioner's claim has never been within the exclusive jurisdiction of the district courts, and the Court of Claims could not have transferred his petition for money judgment to a district court under 28 USC 1506. 28 USC 1491 gave the Court of Claims jurisdiction.

When a court is given jurisdiction of a class of cases, and no discretion to refuse to act, it has no right to decline to exercise such jurisdiction. *Cohens* v. *Virginia,* (1821, Chief Justice Marshall), 6 Wheat. 264 at 404, 19 U. S. 82 at 100, 5 L. Ed. 527; *England* v. *Louisiana State Board of Medical Examiners* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, headnote 1, 84 S. Ct. 461.

The Court of Claims had "jurisdiction" of the subject matter of plaintiff's claim which, in the language of 28 USC 1491, was "against the United States founded . . . upon . . . Act of Congress, . . .". In 1971, the lower court exercised that jurisdiction by ordering a trial before a commissioner; in 1972, it further exercised that jurisdiction by holding such a trial, on one ground of claim.

The defendant in Rynerson's case did not raise the statute of limitations as an affirmative defense, though the rules of the Court of Claims so required.* That

*Defendant vaguely presented the affirmative defense of laches.

court nevertheless passed upon the statute of limitations. Since that question may purport to be the reason for the lower court's dismissing plaintiff's claim, petitioner next considers it.

A question fairly comprised in question A is:

May plaintiff-petitioner maintain an action only for statutory military reserve retirement pay brought in the Court of Claims within six years after reaching age 60, within six years after applying to the armed service for that pay, and within six years of being denied it, when that age and application were conditions precedent set by statute, when six years was the period allowed by the statute of limitations for bringing claims for money in that court, and when that court had power only to render judgment for money claims?

The statute of limitations says that a claim in that court

> ". . . shall be barred unless *the petition thereon* is filed within six years after *such* claim first accrues." (italics supplied 28 USC 2501)

Rynerson's ground of claim, or cause of action, in every aspect, depended by statute on his reaching age 60 (10 USC 1331). Kirby's claim depended on a different section of the statutes, which did not involve that time question, nor any age requirement. His section only required that he have completed 20 years of service and have applied for retirement pay. Yet the Court of Claims made Rynerson's claim depend entirely on the Kirby opinion.

Any intimation that Rynerson's claim accrued before 1965 when he became 60 years old flew in the face of a decision to the contrary which Congress had expressed in 10 USC 1331. That section required reservists to apply to the armed service before they would be entitled to retired pay. The requirement that an application be made, coupled with the age requirement in the same section, prevented the armed service from granting retirement pay to a reservist such as Rynerson, until he had reached age 60 and applied for the pay. Thus Congress required Rynerson to wait until 1965 before suing for retirement pay, and criticism or loss of rights or remedies for so waiting should not be visited upon him.

Until Rynerson actually reached age 60, he had no reason to believe that he was entitled to apply for retirement pay. Until then, he was quite uncertain that he could meet the age requirement of living to age 60. He reached it in 1965. Before then, and before application to the armed services and denial of the pay, any action by him for declaratory judgment or mandamus or reinstatement or a money claim would have been premature, immature, unripe, speculative, rash, precipitous, moot, vexatious and wasteful of both the parties' and the court's time and money.

Until 1965, Rynerson's claim was only incipient, and had not accrued. If he had died before then, no claim could have logically been filed on his behalf.

The cause of Rynerson's action was the government's 1965 breach of its statutory obligation to pay him for retirement. Nothing accelerated the accrual

of that cause of action. So, Rynerson had six years from 1965 in which to sue. He did sue within six years, namely, in 1971. Only another *statute* passed before he sued could have even purported to bar his action. No such statute has been passed.

If Congress thinks any section or combination of the statutes allows too much time in which plaintiffs can sue, or unduly burdens the claims court, *Congress* can amend or supplement them. As stated at the end of the last *Kirby* dissent, the Court of Claims should not do the legislature's work.

> "For courts to interpret statutes in such a way as to extend, limit, modify or alter in any way the manifest intent of the legislature, amounts, in my view, to a clear usurpation of the legislative function."

Dissent of Judge Collins in *S & E Contractors, Inc.* v. *U. S.* (1970), 433 F. 2d 1373 at 1393, c. 1, 2, 193 Ct. Cl. 335, 372, which was reversed in 1972, 406 U. S. 1 at 21, 92 S. Ct. 741, 1411, 31 L. Ed. 2d 658.

The plaintiff "cannot with honesty, make the necessary allegations to support an action . . . until the administrative process is completed . . .". *Crown Coat Front Co.* v. *U. S.* (1967), 386 U. S. 503 at 511 and 515, 87 S. Ct. 1177, 18 L. Ed. 2d 256, a case originating in the Court of Claims and involving the statute of limitations. The administrative process was only complete when the government refused to pay.

In *Stevanus* v. *U. S.* (1957), 138 Ct. Cl. 149, 149 F. Supp. 655, the unanimous opinion quoted from the

same retirement statute as that on which petitioner relies, 10 USC 1331, italicized the words "upon application", and asked the question:

What events fixed the liability?

The court said that the answer was obvious:

> ". . . plaintiff was not entitled to anything until he filed his application . . ." and that ". . . the wrong was committed . . . when defendant denied plaintiff the retired pay . . .".

Long ago, the lower court held in *Taylor's Administrator* v. *U. S., supra,* and this court upheld that decision in *U. S.* v. *Taylor, supra,* that the statute of limitations does not begin to run until the government refuses to pay the money.

Even if Kirby's claim for *active duty* pay accrued all at once when he was discharged (p. 3, slip op.), Rynerson had no claim for active duty pay, and his claim for retirement pay, unlike Kirby's, had to wait until he was 60 years old.

As stated by Judge Davis of the Court of Claims, dissenting in part from *Kirby.*

> "This limitations problem has occasioned much deliberation, . . .".

His statement is true not only of the *Kirby* case, but of many other limitation and related cases in that court. See for example, Judge Davis' lengthy opinion in *Betty Friedman* v. *U. S.* (1962), 159 Ct. Cl. 1, 310 F. 2d 381, cert. denied, 373 U. S. 932, involving disability retirement pay.

The Court of Claims erred in exercising oversight of a legislative nature as to the jurisdiction of other inferior courts, which Congress is authorized by Articles I and III of the federal constitution to exercise, and which Congress has sought to exercise by establishing courts' jurisdictions in statutes. This exercise was by the Court of Claims under the gise of construing its own statute of limitations, which was never intended to affect the jurisdiction of the district courts, nor to increase their burdens.

Fairly comprised within the first question presented, is the following:

Can a court properly dispose of a case on an issue not presented under its own rules?

The Court of Claims in its 1973 ruling against petitioner Rynerson as to the statute of limitations, deviated from its own rules:

Rule 37 (b), requiring the statute of limitations to be set forth affirmatively as a defense, if it is to be considered.

Rule 38 (b) requiring all defenses, in law or fact to a claim, to ". . . be asserted in the responsive pleading thereto . . ." except that certain defenses not here material, could be presented by motion.

Rule 38 (h) providing that a party waives all defenses not properly presented. (Even if the petition had been filed more than six years after the cause accrued, that would not deprive the lower court of jurisdiction of the subject matter.)

Yet in 1973, the lower court dismissed the petition on an issue not presented under its own rules, namely, the issue of the statute of limitations. The government presented that point only by motion to dismiss Rynerson's case.

The rules of the lower court as to pleading clearly delineates part of the "process" which is "due" a litigant. If the court before making rules had power to consider limitation of actions on the court's own motion, the court by making those rules, gave up that power, when the question was raised only by motion to dismiss.

Court rules are no less to be followed than the regulations of administrative agencies. By not following its own rules, the lower court denied Rynerson due process, contrary to the Fifth Amendment.

The Court of Claims' 1971 decision was that Rynerson's claim was not barred by the statute of limitations. If that statute is jurisdictional, then the court decided at that time that it had jurisdiction, or the right to decide the merits, of the case.

Res judicata exhausted the lower court's power to decide its own jurisdiction in Rynerson's case. After a court has decided that it has jurisdiction, it should stick by the decision.

> "The finding of jurisdiction is considered to be res judicata of the issue." (of whether there is jurisdiction). Professor Charles Alan Wright, *Handbook of the Law of Federal Courts* (West Pub. Co. 2d ed., 1970), page 50, §16, "Jurisdiction to determine jurisdiction."

So the 1973 decision by the Court of Claims against Rynerson, based on the time bar, was erroneous for this reason as well as on the merits.

LACHES

The majority opinion in *Kirby* v. *U. S.*, did not mention laches but mentioned some of its elements.

There are three clear differences between the defenses of laches and limitation.

One defense (limitation) is statutory, but the other (laches) is not.

One defense (laches) requires prejudice to defendant, but the other (limitation) does not.

Limitation requires a specific length of time; laches does not.

Until 1972, all actions in the Court of Claims were actions for the recovery of money alone. Rynerson and Kirby had already filed there in 1971. Rynerson never sought anything but a money judgment.

An action for recovery of a money judgment "is one at law". *Wehrman* v. *Conklin* (1894), 155 U. S. 314 at 325, 15 S. Ct. 129, 133, c. 2, 39 L. Ed. 167. On page 326, the court said:

> "Though a good defense in equity, laches is no defense at law, if the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after a lapse of 19 years

and 11 months, he is as much entitled as matter of law to maintain it, as though he had brought it the day after his . . ." claim accrued.

So the Court of Claims, in deciding a case where only a money judgment is sought, has no power to dismiss for laches. There is thus conflict between the Supreme Court and the Court of Claims about applying laches to pure money claims.

In refusing to consider the merits of petitioner's claim for money, the Court of Claims relied on possible but unproved facts appropriate only in defending on the ground of laches, against a claim for equitable relief. Since petitioner Rynerson had not sought equitable relief in his petition filed in 1971 in the Court of Claims, and never did seek such relief, it is inappropriate to dismiss his claim, if the dismissal is based only on his delay for a period less than the statute of limitations.

Even if the Court of Claims had power to dismiss for laches, it could not properly deny relief to any plaintiff without considering whether his delay in suing *actually* prejudiced defendant.

Though the majority opinion in *Kirby* v. *U. S.* does not even mention laches, its penultimate paragraph does bring in delay, "public policy" and *possible* prejudice to the government, in its contesting stale claims generally.

Judge Davis, in dissenting, said that laches on Kirby's part was not shown as there did not appear to have been prejudice to the government (p. 14). Judge

Nichols, in dissent, at page 17, agreed with Judge Davis on this, and at page 16 indicated that the defense of laches was "anomalous". The majority only said there "can be" prejudice in cases of stale claims (near end).

The commissioner in Rynerson's case indicated that there was no evidence of prejudice to the government from Rynerson's delay. (p. 8 of his opinion).

The Court of Claims' recent vacillation on whether to apply laches is another example of the need for Supreme Court review where the time of accrual of claims is involved. *Cason* v. *U. S.* (Jan. 1973), 200 Ct. Cl. 424, 471 F. 2d 1225, vacating its 1972 judgment in the same case, 198 Ct. Cl. 650, 461 F. 2d 784. *Cason* waited until one day before the six years were up. His delay did not appear to prejudice the government and he was given judgment.

Through the doctrine of laches, the United States Court of Claims has for years intermittently and sometimes apparently at its mere whim, been defeating the Congressional will expressed in the statute of limitations. Congress there fixed a period of six years in which to sue the government. Yet the Court of Claims in one case, held that a delay of only 11 months constituted a defense. *Alpert* v. *U. S.* (1963), 161 Ct. Cl. 810.

While we are on the subject of equitable defenses, it is appropriate to recall the maxim that a party who seeks equity must do equity. The principle should apply to a court which seeks to require a party to invoke equitable remedies. Yet the Court of Claims' require-

ment that plaintiffs seek one or more equitable remedies before suing for money would not do equity.

The requirement would drive plaintiffs to seek remedies which would probably be illusory and futile. They are the remedies described as reinstatement, mandamus and declaratory judgment.

"Reinstatement" would amount to specific performance of a contract for personal service, a remedy not granted (*81 C.J.S.* 591, §82 of Specific Performance).

Reinstatement would have to be sought by mandamus. In a situation where the judgment of the executive is involved, mandamus was not generally available. *34 Am. Jur. 927,* §150 of Mandamus, t. n. 9 and 10.

An action for declaratory judgment has not been held to be obligatory. Even if it were obligatory, it would be so only if there were a *matured* controversy. Rynerson's controversy was not mature until 1965, because he had not matured to the age of 60.

OTHER PUBLIC POLICIES

But the Court of Claims here has flouted more than a principle of equity, more than acts of Congress, and more than the doctrine of separation of powers announced in the constitutional provisions cited.

The *Kirby* decision required that plaintiff convince some court of general jurisdiction that he was entitled to credit for service enough to total 20 years. It required that he *convince* such other court *before* he came to the Court of Claims (pp. 4-11, slip op.).

Thus, the *Kirby* case stirred up and added a burden of litigation which was previously unnecessary to collect disputed pay.

The lower court's majority finally mentioned that public policy is against stale claims. However, that public policy is frequently outweighed by other, more compelling public policies:* Some are that justice should be done by the ordinary remedy at law, money judgment, if requested and if possible, that a cause of action should not be split (*U. S.* v. *Throckmorton*, hereinafter quoted), that litigation not be encouraged to proliferate unnecessarily, that there be an end to it (15 A CJS 71, Sec. 14 of Common Law, t.n. 60), and that former servicemen should be liberally treated under retirement statutes (*Lemly* v. *U. S.* (1948), 109 Ct. Cl. 760, 75 F. Supp. 248, end).

Shuttling or shuffling the parties between ". . . tribunals is a sure way of defeating the ends of justice." Concurring opinion of Justice Douglas in *England* v. *Louisiana State Board of Medical Examiners*, *supra*, at p. 495, of his opinion.

If this case had been filed in district court and that court had wanted to transfer it to the Court of Claims because of the latter's superior expertise in handling claims against the government, the transfer would have been somewhat plausible; but this is a case where the court of superior expertise, the Court of Claims, seeks to throw the plaintiff into the general litigation of a district court which is *less* expert than the Court of Claims as to government claims. From the standpoint

*Belton v. Trayner (C.A. Va. 1967), 381 F. 2d 82, 87.

of justice as a whole, the action of the Court of Claims has not even been expedient.

To require two lawsuits where only one grew before, protracts litigation.

> ". . . protracted . . . litigation has never been known for . . . beneficial effect on contract performance."

Dissent of Judge Collins in *S & E Contractors, Inc.* v. *U. S.*, 433 F. 2d 1373 at 1398, c. 2, 193 Ct. Cl. 335, which was reversed in 1972, 406 U. S. 1, at 21, 92 S. Ct. 741, 31 L. Ed. 2d 658.

The same is true as to performance of statutory duties.

Kirby required a preliminary action either for mandamus, reinstatement or declaratory judgment. If a plaintiff successively tried these remedies in some other court, and failed, there would be four times the amount of litigation and resulting harassment to courts and parties; four times that involved in a single action in the Court of Claims. Success in one of the 3 preliminary lawsuits still would not give plaintiff a judgment for a definite amount of money. So, *Kirby* violates the established policy of the law against splitting actions, which is stated as follows:

> "There are no maxims of law more firmly established or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; . . ."

U. S. v. *Throckmorton* (Oct. 1878), 98 U. S. 61, 65, 25 L. Ed. 93.

Now, when the courts are increasingly crowded, is no time to drop the rule against splitting causes of action. It would be poor judicial administration to fail to insist that the rule be followed.

The government would be further disadvantaged by petitioner's suing in district court, for if he were diverted to that court and finally got a money judgment there, interest would have to be allowed (28 USC 2411 (b)), whereas in the Court of Claims, he would not initially be awarded interest since no statute or contract sued on provided for it (28 USC 2516).

Kirby and Rynerson resorted to Correction Boards (mentioned in 10 USC 1551, 1552 and in Kirby at p. 3, slip opinion). Their purpose was to get their records corrected administratively and thus avoid all court litigation. Resort to such boards was optional; no statute required it, nor did any statute require that any judicial remedy be sought before suing in the Court of Claims. The *Kirby* opinion erred in requiring them to repeat their efforts in a court other than the Court of Claims. It was a judicial declaration of a doubtful public policy. Even if it were a good public policy, a court is not the place, and after litigation has started is not the time, to spring it upon a plaintiff. This is especially so when the entire field of the litigation is otherwise statutory.

The Court of Claims erred in exercising supervision over other inferior federal courts partly coordinate to the Court of Claims, and inferior to the Su-

preme Court, as mentioned in the latter court's rule 19, § 1 (b), last line.

It is fitting that this court speak the last word on the public policies involved here. Mere silence by this court would not suffice to avoid the effects of the lower court's continued floundering on the matter of time-bars.

Rynerson chose to litigate in the Court of Claims. According to that court's unanimous decision in 1971, he had made a proper choice. A plaintiff cannot be forbidden to try the facts upon which his right to relief is based "before a court of his own choice, . . ." if the court he selects has jurisdiction of cases such as his. *Willcox* v. *Consolidated Gas Company* (1909), 212 U. S. 19, 40, 53 L. Ed. 382, 29 S. Ct. 192, 195, 48 LRA NS 1134; *England* v. *Lousiana State Board of Medical Examiners,* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, beginning of majority opinion and at Douglas' concurring opinion.

Rynerson had a trial before a commissioner. The Court of Claims should have decided his case on the merits, if it was not time barred.

RETROACTIVE EFFECT OF NEW RULE OF LAW WAS IMPROPER

Fairly comprised within the first question presented in this case, is the following:

When a statutory obligation of the government depends on a plaintiff's reaching age 60, can a court retroactively after he reaches it, require that he have

litigated other related facts in anticipation of his so surviving?

In 1971, the Court of Claims issued its solemn and unanimous ruling by experienced judges, that Rynerson was entitled to a decision on the merits of half of his grounds: i. e. that he was entitled to a decision on whether his discharge was wrongful.

In 1972, the court, through a commissioner, held a hearing on that part of Rynerson's claim.

In 1973 the Court of Claims legislatively (illegally) and retroactively abolished the remedy which in 1971 it had declared available to petitioner. Judge Nichols' *Kirby* dissent, p. 14, end, said this was a new rule.

A statute purporting to bar a plaintiff's suit, such as Kirby's or Rynerson's, would have been retroactive. A retroactive statute could not have constitutionally justified dismissal of his suit. A retroactive statute would have deprived him of due process. A retroactive court decision should not accomplish more. Yet, *Kirby* would do so.

The lower court, by causing Rynerson's remedy to fail, also caused his right to fail. Thus, in effect, the court in 1973 abolished an obligation of the government, created by its own statute (10 USC 1331, 1332) which was valid in 1971 and would otherwise be still valid, and abolished any obligation of implied contract arising by virtue of the same facts. Hence, the 1973 decisions of the Court of Claims deprived petitioner of property without due process of law.

The 1973 decision against the petitioner did not mention the facts that he had spent time and money

in prosecuting his claim to trial before 1973. On the other hand, Kirby's case was decided by summary judgment without a trial. He presumably spent less money in prosecuting his claim than Rynerson did in his trial and other steps. Kirby's claim was filed in October 1971, after Rynerson's (p. 1, Kirby slip. op.).

The new rule announced in *Kirby* v. *U. S.* was not confined in its operation to future cases arising from fact situations which might occur after such announcement. Such a confinement would have avoided prejudice to Kirby and to Rynerson and others similarly situated.

Instead, the majority opinion retroactively applied the new rule not only to Kirby, but, without saying so, applied it also to others similarly situated on 11 May 1973, the date *Kirby* v. *U. S.* was announced or published. One of the class affected was petitioner Rynerson. In fact, the lower court's decision of June 1973 in *Rynerson* v. *U. S.* specifically applied the *Kirby* rule to Rynerson.

Since *Rynerson* v. *U. S.* had not on 11 May 1973 become final, the lower court on that date and later could easily have declared in his case that the new Kirby rule was inapplicable to Rynerson, at least, and could as easily have extended the exemption to others situated similarly to Rynerson. As elsewhere shown, distinctions aplenty existed between Kirby and Rynerson.

Dissenting Judge Davis asserted that *Kirby* was inconsistent with the 1971 *Rynerson* opinion as to time-bar (Kirby, p. 11, note, and p. 12). Another dissent

indicated the same, referring to Rynerson as Anonymous.

After a court has long remedied wrongful discharges and denials of retirement pay,* by money judgments, without requiring plaintiffs to resort to some other court first, the chosen claims court's refusal to follow its accustomed procedure, and its insistence that plaintiffs test their money claims elsewhere first, is a literal denial of Fifth Amendment due process. The old process, efficient for plaintiffs, should not be changed during litigation, as it was for Kirby and Rynerson, to a less efficient process which would require two, three or four suits instead of one. To make a change pendente lite is a wide departure from the accepted and usual procedure, so wide that the Supreme Court should intervene by certiorari.

This court has declined to give retroactive effect to its ruling in a civil case. *England* v. *Louisiana State Board of Medical Examiners* (1964), 375 U. S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, at end. A new rule of law announced by a trial court in a civil case should not have retroactive effect either.

B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action.

Can the Court of Claims refrain from hearing evidence on an issue presented by a petition for money due from the United States under statute, which issue the government never attacked by motion or demurrer,

Lemly v. *US* (1948), 109 Ct. Cl. 760, 763, 75 F. Supp. 248.

and the facts as to which issue the government did not deny until after the court had decided the issue?

The reserve retirement pay law on which Rynerson relies was enacted 29 June 1948. (History of 10 USC 1331, 1332). Before that time, according to his petition below (¶¶ 3 & 4), the Army had not determined that he had ceased to be a reservist. If he had not ceased to be a reservist, before 1947, he remained one for twenty years from his first membership, 1927. Therefore, but for one condition, reaching age 60, his incipient right to retirement pay vested when the law was passed in 1948. Of course, a mere incipient right is not an accrued right.

The lower court has departed from the usual course by not deciding after hearing evidence, whether he was discharged from the reserve in 1945. In 1971, it had departed from the usual course by deciding this issue before hearing evidence, and before the defendant had denied any part of Rynerson's petition, at a time when, under its Rule 38 (c), the lower court should have been assuming his petition to be true. See also *House* v. *Mayo* (1945), 324 U. S. 42, 45, 65 S. Ct. 517, 520, 89 L. Ed. 739; *Diamond* v. *U. S.* (1970), 192 Ct. Cl. 502, 509, 427 F. 2d 1246, note 11.

The lower court on 11 November 1971, ruled against petitioner Rynerson on the effect of the discharge and held that he had been discharged from the reserve on 14 October 1945. There having been no evidentiary hearing on that issue, the ruling was mere dictum. Persistence in following this dictum denied plaintiff

a hearing on that issue, and therefore denied him due process of law.

Also on 11 November 1971, the court ordered a commissioner to hear evidence. He construed this order to mean that he should hear evidence only on the other issue, as to whether such discharge was wrongful. In the hearing, he tried to limit the evidence to that point. His opinion did not consider the first ground of claim, that the petitioner's commission was not ended by the 1945 discharge. Plaintiff-petitioner excepted to the omission to hold an evidentiary hearing on that issue.

In 1973, the court, without deciding the merits of *either* of plaintiff's grounds of claim, ordered dismissal of the entire petition because of the time-bar, citing only *Kirby* v. *U. S.* Then the court denied plaintiff's motion for a trial on and/or reconsideration of the question of whether plaintiff was discharged from the reserve. This was a final denial of due process for plaintiff on the first ground of his claim. Those refusals emphasized an additional difference between the claims of Rynerson and Kirby. Kirby did not have a reserve commission or membership, and so did not and could not, present a like issue, as to the *effect* of his discharge, which was from the *regular* Air Force. Kirby thus could only assert, as he did, that his discharge was wrongful. The persistence of reserve membership was not involved in *Kirby* v. *U. S.*

What would have been the effect of finding for Rynerson that his 1945 discharge from active duty did

not discharge him from the reserve? It would have been that his reserve membership continued until at least 1947, when his 20 years of reserve service were therefore completed. Such a favorable finding would have obviated the need to decide the far more complicated issue of wrongful discharge.

If this court agrees that time did not bar the petition below, this court should grant certiorari also because of the lower court's denial of a hearing as to the effect of the discharge. That was a denial of due process as to such issue.

A right of action or claim is property and the law is clear that the discharge of a reservist from active duty does not end his commission. *Denby* v. *Berry,* post. The court below did not mention that case in any opinion or judgment in Rynerson's case, though he cited it to such court. Naturally it was not cited in the Kirby case, since Kirby was not a reservist.

When the Army has wanted to discharge an officer from his reserve commission, it has specified that the discharge was "from his commission". *Seltzer* v. *U. S.* (1943), 98 Ct. Cl. 554.

As Chief Justice Taft wrote for a unanimous court, concerning a commission in the naval reserve:

> ". . . members of this force occupied two statuses, one that of inactive duty, and the other of active service" (p. 33).
>
> The Navy "did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation de-

> tached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy" (p. 34).

Denby v. *Berry* (1923), 263 U. S. 29, 44 S. Ct. 74, 68 L. Ed. 148.

A condition once existing, such as a status or office held, is presumed to continue. The burden is on one asserting the contrary of a presumption, to rebut the presumption by evidence. *Kortz* v. *Guardian Life Ins. Co.* (CA 10, 1944), 144 F. 2d 676, 678, cert. denied 323 U. S. 728. Yet the 1971 dictum, without the defendant's introducing any evidence, overruled the presumption that plaintiff's commission continued in force after 1945, and until 1947.

The defendant did not move for summary judgment as to any part of plaintiff's petition below. Before the 1971 dictum, defendant did not even cast doubt on the presumption by denying it in any pleading, and the lower court did not require the parties to introduce evidence in any trial as to the effect of the 1945 discharge.

There is another reason for distinguishing Rynerson's case from Kirby's. Rynerson's 20 years of service were partly attained by a statute which in effect extended past 1947 his membership in the armed service reserve (55 Stat. 799), unless the President sooner ended it. No statute of similar purport extended the creditable time served by Kirby.

CONCLUSION

The United States Court of Claims misdecided a new and important question of federal law, decided four federal questions in ways conflicting with decisions of this court, and far departed from the accepted and usual course of judicial proceedings. These grounds for certiorari are summarized at the beginning of REASONS FOR GRANTING THE WRITS.

These lower court errors involved others discussed under NATURE OF THE CASE, such as the lower court's abuse of judicial power by retroactive judicial legislation and otherwise, thus enlarging technical and anomalous time-bars, and that court's non-use of its power to hear and decide the merits of a money claim against the United States based on statute benefiting reservist veterans, are believed to require writs of certioari.

Respectfully submitted,

WENDELL P. RYNERSON
403 E. Second Street,
Madison, Indiana 47250

Petitioner and attorney for himself